73-1662

MAY 4 1974
MICHAEL RODAK, JR.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73

G. DOUGLAS TIBBITTS & MARY TIBBITTS, Bankrupts,

Petitioners,

v.

JAMES E. CUSSEN, Trustee, *Respondent.*

PETITION FOR A WRIT OF CERTIOARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioners, G. DOUGLAS TIBBITTS and MARY TIBBITTS, respectfully pray that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 24, 1974.

OPINION BELOW

The judgment of the Court of Appeals is unreported, and it appears in the Appendix hereto. The Order of the District Court for the Eastern District of California, which is also unreported, is printed in the Appendix, together with the Reporter's Transcript of the District Court's oral opinion, pursuant to which said order was entered.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 24, 1974. A timely petition for rehearing was denied on February 6, 1974, and this petition for certioari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. s1254(1).

QUESTION PRESENTED

Whether s25(a) of the Bankruptcy Act (11 U.S.C. s48(a), which provides up to 40 days from which to appeal a judgment of the District Court, together with Rule 4(a) of the Federal Rules of Appellate Procedure which provides a 30-day extension for said purpose, allows the District Court, in its discretion, to extend time for taking an appeal in a bankruptcy case for a total period of up to 70 days?

STATUTORY PROVISIONS INVOLVED

Bankruptcy Act.—

s25 (11 U.S.C. s48) (a):

"Appeals under this title to the United States Courts of Appeals shall be taken within thirty days after written no-

tice to the aggrieved party of the entry of the judgment, order or decree complained of, proof of which notice shall be filed within five days after service or, if such notice be not served and filed, then within forty days from such entry."

Judiciary and Judicial Procedure —

28 U.S.C. s2071: Rule-making power generally.

"The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

28 U.S.C. s2075: Bankruptcy rules.

"The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure under the Bankruptcy Act.

Such rules shall not abridge, enlarge, or modify any substantive right.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

Rule 4(a), Federal Rules of Appellate Procedure:

"*Appeals in Civil Cases.* In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the

judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

* * * * *

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate."

STATEMENT

Petitioners were involuntarily adjudicated bankrupts. *Tibbitts v. Cussen.* 456 F.2d 1314 (9th Cir.), *cert. denied,* 409 U.S. 982 (1972). Their principal asset consisted of 49% of the common stock of Davis Enterprise, Inc. The Trustee (Respondent herein), over the objection of Petitioners and the unsecured creditors, obtained approval from the Bankruptcy Referee of an agreement to sell the stock for $100,000.

Petitioners and the unsecured creditors sought review of the Referee's order in the District Court contending the evidence before the Referee revealed the stock was worth four times more than the amount of the proposed sale price. On October 11, 1973, the District Court entered an order affirming the Referee.

Copies of the District Court's order and opinion were mailed to the parties by the clerk of the court that day, but no separate Notice of Entry of Judgment was mailed or filed by the clerk or the prevailing party.

In the meantime, the Petitioners' attorney in the District Court had been ill, and he advised them to perfect an appeal *in propria persona*, and they proceeded to do so.

Because the Referee of the Bankruptcy Court and the Trustee appointed by him were respondents to the petition for review, the Petitioners assumed that they had sixty (60) days to take an appeal because an officer of the United States was a party. Moreover, shortly before they were about to file their *in pro per* Notice of Appeal, the condition of MARY TIBBITTS' sister, who was terminally ill, worsened, requiring her sister's full care and attention. Consequently, the Petitioners presented their Notice of Appeal to the clerk of the District Court on December 11, 1973, sixty-one (61) days after the entry of the order appealed from.

The clerk of the District Court accepted the Notice of Appeal and accepted the Petitioners' affidavit explaining that the illness of their attorney and the illness of the sister were responsible for their delay. Their affidavit was filed with the Clerk on December 12, 1973. Their former attorney had also advised the Petitioners to also obtain an order from the District Court extending time to file the appeal under Rule 4(a), Federal Rules of Appellate Procedure. This they attempted to do, but the District Court declined to entertain the motion.

The Respondent-Trustee then filed a motion in the Court of Appeals to dismiss the appeal as untimely filed. On January 24, 1974, the Court of Appeals granted the motion and dismissed the appeal "for lack of jurisdiction." The Petitioner then filed a petition for rehearing, specifically asking the Court of Appeals to clarify whether the appeal was dismissed because no order on a motion for extension had been made in the District Court in the first instance, or whether the Court of Appeals construed Rule 4(a) to preclude the District Court from extending time beyond sixty (60) days in a bankruptcy proceeding despite contrary provisions in s25(a) of the Bankruptcy Act. Petitioners requested the Court of Appeals to remand to the District Court for a determination whether there was excusable neglect in the event the Court was relying on the former rationale.

The petition for rehearing was denied without opinion on February 6, 1974. Nevertheless, out of an abundance of caution, Petitioners thereafter filed a motion in the District Court, asking the District Court to grant a *nunc pro tunc* order extending time and in effect to ratify their filing of the Notice of Appeal on December 11, 1973. Petitioners relied upon *Torockio v. Chamberlain Mfg. Co.*, 456 F.2d 1084 (3d Cir. *en banc* 1972), for authority, and acted promptly as they did to minimize any prejudice that might result to Respondents from a retroactive ratification of a late-filed Notice of Appeal. On March 11, 1974, the District Court denied Petitioners' motion, specifically holding that Rule 4(a) controlled the timing of the appeal rather than s25(a) of the Bankruptcy Act and therefore that the District Court had no discretion to extend time whether or not it found excusable neglect. (App. B).

Petitioners thereupon filed this petition without proceeding again to the Court of Appeals, believing that both the District Court and the Court of Appeals have had the opportunity to rule upon the question here presented and have denied the relief sought in each instance.

REASONS FOR GRANTING THE PETITION

I. SUMMARY.

This case presents a single, important question affecting appellate practice in bankruptcy proceedings. Section 25(a) of the Bankruptcy Act (11 U.S.C. s48(a)) provides that appeals in bankruptcy cases shall be taken with a period of time from the entry of the order appealed from ranging up to forty (40) days, depending on whether certain procedures are followed in the district court. Rule 4(a), Federal Rules of Appellate Procedure, provides, on the other hand that appeals in all civil cases, including bankruptcy proceedings, shall be taken within thirty (30) days of entry of judgment. Thus, a conflict exists between these two provisions.

In the instant case the resolution of this conflict had the effect of absolutely barring the Petitioners' appeal on the merits, since the courts below declined to even consider Petitioners' motion for allowance of a late appeal on grounds of excusable neglect, despite Petitioners' contention that by combining s25(a) and Rule 4(a) bankruptcy appeals can be extended for a period up to 70 days.

II. THE RULES MUST BE CONSISTENT WITH ACTS OF CONGRESS AND CANNOT ABRIDGE OR MODIFY ANY SUBSTANTIVE RIGHT.

In granting rule-making powers to the Supreme Court, Congress provided limitations upon that power:

first, that such rules "shall be consistent with Acts of Congress . . . ," 28 U.S.C. s2071 (1972 ed.), and

second, that the "rules shall not abridge . . . or modify any substantive right." 28 U.S.C. s2075 (1972 ed.)

Initially, it is obvious that Rule 4(a) is inconsistent with s25(a) of the Bankruptcy Act which is an Act of Congress. Although the drafters of Rule 4(a) did not address this problem squarely, it can be inferred from the Advisory Committee comments that the answers to the facial inconsistency lies in that fact that the changes were considered "minor." 43 F.R.D. 123, 127-8 (1968).

While a change in the time for taking an appeal of less than ten (10) days may seem "minor" to a committee of academicians, it is hardly so to a litigant adversely affected thereby. In the instant case the change makes the difference of absolutely no appeal at all and the right to move for an extension on grounds of excusable neglect. In the more common situation, *e.g.*, those where bankruptcy appeals are filed between the 30th and 40th days, the change will make no difference between having an appeal as of right or having to rely upon the discretion of a district judge.

These are hardly "minor" factors. Hence, the attempt by the drafters of Rule 4(a) to "supercede" s25(a) of the Bankruptcy Act, 43 F.R.D. at 127, must fail on grounds of inconsistency.

More importantly the changes abridge or modify a substantial right. The Advisory Committee may have considered these "procedural" matters, but this Court has long held that the right to be heard on the merits is a substantial one and not to be abridged by technical interpretations of procedural rules. *E.g., Foman v. Davis*, 371 U.S. 178, 181 (1962).

In addition, the Advisory Committee noted that Rule 4(a) is derived directly from former Rule 73(a), Federal Rules of Civil Procedure. 43 F.R.D. at 127. Thus prior decisions harmonizing Rule 73(a) and s25(a) of the Bankruptcy Act should be persuasive and controlling, barring contrary rulings from this Court. Prior decisions, especially by the Ninth Circuit, have liberally construed conflicts between the two provisions, and when in doubt have allowed the *longer* period of the Bankruptcy Act to prevail. See *e.g., Mardick v. Stover*, 392 F.2d 561 (9th Cir. 1968); *Wilson v. Shamrock Amusement Corp.*, 221 F.2d 687 (9th Cir. 1955). A similar approach vis-a-vis conflicts between the Rules of Appellate Procedure and the Bankruptcy Act seems equally equitable and proper.

Thus, Petitioners urge that Rule 4(a) be read in harmony with s25(a), not inconsistently with each other. Such a reading would allow the initial filing period provided by Rule 25(a) and allow the extension periods provided by Rule 4(a).

III. ANY CONTRARY CONSTRUCTION OF RULE 4(a) AND THE BANKRUPTCY ACT WOULD DEFEAT THE ENDS OF JUSTICE.

Rule 4(a) provides that such extensions granted by the district courts "may not exceed 30 days from the expiration of the time otherwise prescribed by this subdivision," and the subdivision, as noted above, indicates that appeals in bankruptcy cases must be taken in 30 days. Thus, under a narrow construction, Rule 4(a) could be read to allow a maximum time, including any extension, of 60 days for taking appeals in all cases, except those where an officer of the United States is a party.

Such a construction, however, would be contrary to the time-honored precept that "(r)ules of . . . procedure are devised to promote the ends of justice, not to defeat them." *Hormel v. Helvering*, 312 U.S. 557 (1941). Rules of procedure, especially rules setting forth jurisdictional time periods, should be construed liberally, so as to allow the maximum leeway possible, rather than the minimum, consistent with the ends of justice.

Moreover, the most liberal construction, *i.e.*, to construe the outside maximum time for bankruptcy appeals as 70 days, would hardly be offensive of the purpose of the rule which is to place a reasonable, but absolutely fixed, deadline on the taking of an appeal. The period thus allowed would be only 10 days greater than the period allowed in most appeals, and 20 days less than that allowed in appeals where the government is a party. The interpretation urged by the Petitioners would therefore both retain orderliness, while also requiring no sacrifice of their opportunity to appeal on the merits. "Orderly rules of procedure do not require sacrifice of the rule of fundamental justice." *Hormel v. Helvering*, supra.

IV. AUTHORITATIVE CONSTRUCTION IS REQUIRED.

An authoritative ruling is required to clarify the confusion that presently exists. Although the Advisory Committee asserted that Rule 4(a) "superceded" s25(a) of the Bankruptcy Act, reference to either the official compilation of federal statutes—United States Code (1972 Edition)—or the most commonly used unofficial compilation, United States Code Annotated (West Pub. Co. 1973 Supp)—will reveal no such deletion, abrogation or repeal of that section. 11 U.S.C. s48(a).

Nor were either Petitioners or Respondents, in argument below, able to cite any authoritative or dispositive appellate court ruling subsequent to the promulgation of the rules. Also the new Bankruptcy Rules promulgated October 1, 1973, are silent on the question.

An unwary practitioner, relying upon the statute (as one ought to be able to do in such a situation), could easily

conclude his or her client had 40 days to file a Notice of Appeal from a bankruptcy order, only to find the clients at the mercy of a district court's exercise of discretion with respect to being allowed to proceed on the merits of the appeal, if, for example, the Notice of Appeal was filed 31 days after the entry of judgment, when their attorney was hospitalized after a month's illness and there also was a critical illness in the family.

Such a situation should not be allowed to prevail but should be clarified—hopefully in favor of a liberal construction furthering the goal of hearing matters on their merits rather than disposing of them on procedural grounds.

CONCLUSION

For the reasons set forth hereinabove, Petitioners pray this Court to grant their Petition for Writ of Certiorari in order to review the denial of their opportunity to appeal on the merits from the order of the District Court.

Dated:

Respectfully submitted,

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555 Polk Street, Suite 201
San Francisco, Ca. 94102.
Telephone: (415) 771-5281
Attorney for Petitioners

APPENDIX

A. Order of District Court dated March 14, 1974, denying motion for extension of time to take appeal.

B. Oral opinion of District Court of March 14, 1974.

C. Order of Court of Appeals dated January 24, 1974, dismissing appeal.

D. Notice from Clerk of Court of Appeals of Entry of Judgment pursuant thereto, dated January 24, 1974.

E. Order of Court of Appeals denying petition for rehearing dated February 6, 1974.

United States District Court
Eastern District of California

In re

G. DOUGLAS TIBBITTS and
MARY TIBBITTS,
Bankrupts.

Bankruptcy No. Bk.S 6610P

ORDER DENYING MOTION FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL

The bankrupts' motion for an order extending time to file notice of appeal came on for hearing on March 11, 1974. The bankrupts appeared by JOHN T. HANSEN of Hansen, Jaffe & Weis, and THOMAS W. OLSON, JR. appeared for JAMES E. CUSSEN, trustee. The court, after having heard the argument of counsel and being fully advised, finds that the motion should be denied.

IT IS ORDERED that the bankrupts' motion for an order extending time to file notice of appeal is denied.

DATED: March 11, 1974.

THOMAS J. MacBRIDE
United States District Judge

In the District Court of the United States
For the Eastern District of California

Before: HONORABLE THOMAS J. MacBRIDE, Judge

In re

G. DOUGLAS TIBBITTS,
and MARY TIBBITTS,
Bankrupts.

Bankruptcy No. Bk.S 6610P

—0—

REPORTER'S TRANSCRIPT
OF
JUDGE'S DECISION

MONDAY, MARCH 11, 1974

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APPEARANCES:

For the Bankrupts

JOHN T. HANSEN
Attorney at Law

For the Trustee:

THOMAS W. OLSON, JR.
Attorney at Law

RICHARD J. FONG
Official Reporter
U.S. District Court
Sacramento
March 11, 1974
10:00 A.M.
Sacramento, California

THE COURT: All right, Mr. Hansen. Well, Mr. Hansen, you asked me to exercise my discretion. I don't think I have any discretion in this matter. I think your sixty-one days is just simply out of the ballpark, and I feel the Supreme Court in promulgating the new Rule 4(a) in 1968 certainly knew what it was doing and had in mind the specific intent to amend the former section allowing the forty days in which to appeal in a bankruptcy case.

As Mr. Loveridge pointed out, their intention was it should be the same in all appeals; that is, you have the thirty days in which to file your notice. And I think that the uniformity has resulted and that in spite of the fact, as you say, the advisory committee does not make the law, nevertheless, it is helpful to look to the advisory committee's comments to find out what they intended to accomplish and in this instance I think they did legally accomplish their objectives and that was to bring uniformity into the appeal process.

I regret to hold this way because I realize we are just talking about one day, but nevertheless I am satisfied that if I held otherwise that the matter would go down to the Ninth Circuit and they would rule exactly as they have before, and that is to deny the appeal, so that the Motion to Extend is denied.

CERTIFICATE OF REPORTER

I, RICHARD J. FONG, Official Reporter, certify that the foregoing 3 pages constitute a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

RICHARD J. FONG
Certified Shorthand
Reporter.

OFFICE OF THE CLERK

United States Court of Appeals for the Ninth District

U. S. Court of Appeals and Post Office Building
7th and Mission Streets, P. O. Box 547
San Francisco, California 94101

Jan. 24, 1974

Re: No. 74-1007 G. DOUGLAS TIBBITTS and MARY TIBBITTS VS. JAMES E. CUSSEN

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered 1-24-74 dismissing the appeal for lack of jurisdiction.

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing in filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

DENNIS R. MATHEWS,
Clerk
U.S. Court of Appeals

United States Court of Appeals
For the Ninth Circuit

G. DOUGLAS TIBBITTS and MARY TIBBITTS,

Bankrupt-Appellants

VS.

JAMES E. CUSSEN,
Trustee-Appellee

No. 74-1007

Filed Jan. 24, 1974

Before: CHAMBERS and ELY, Circuit Judges, U. S. Court of Appeals.

ORDER

On motion of appellee, it appearing that the notice of appeal in this matter was untimely, the appeal is dismissed for lack of jurisdiction.

RICHARD H. CHAMBERS
WALTER ELY
U. S. Circuit Judges

United States Court of Appeals
For the Ninth District

G. DOUGLAS TIBBITTS and MARY TIBBITTS,

Bankrupt-Appellants

VS.

JAMES E. CUSSEN,
Trustee-Appellee

No. 74-1007

Filed Feb. 8, 1974.
Feb. 6, 1974

The petition for rehearing is denied.

R. H. CHAMBERS
WALTER ELY
U. S. Circuit Judges